

SUBRAMANIAM SUBAKARAN**A****v.****PP**

HIGH COURT MALAYA, ALOR STAR

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MOHD SOFIAN ABD RAZAK JC

[CRIMINAL REVIEW NO: 43-01-2006]

9 JANUARY 2007

CRIMINAL PROCEDURE: *Revision - Criminal Procedure Code, s. 323(1) - Revision against decision of magistrate - Non-possession of valid pass - Applicant sentenced to four months' imprisonment and one stroke of rattan - Whether applicant registered with UNCHR as asylum seeker under 1951 Convention relating to Status of Refugees and 1967 Protocol relating to Status of Refugees - Whether applicant presented himself without delay to authorities and showed good cause for illegal entry - Article 31 of the Convention relating to the Status of Refugees 1951-1967 Protocol 1951 Convention and art. 22 of Convention on Rights of Child - Whether legally binding on Malaysian courts - Article 2 of the 1951 Convention - Immigration Act 1959/63, s. 6(1) & (3) - Whether applicable - Whether court ought to interfere with decision of magistrate*

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IMMIGRATION: *Non-possession of valid pass or permit - Applicant sentenced to four months' imprisonment and one stroke of rattan - Whether applicant registered with UNCHR as asylum seeker under 1951 Convention relating to Status of Refugees and 1967 Protocol relating to Status of Refugees - Whether applicant presented himself without delay to authorities and showed good cause for illegal entry - Article 31 of the Convention relating to the Status of Refugees 1951-1967 Protocol 1951 Convention and art. 22 of Convention on Rights of Child- Whether legally binding on Malaysian courts - Article 2 of the 1951 Convention - Immigration Act 1959/63, s. 6(1) & (3) - Whether applicable - Whether court ought to interfere with decision of magistrate*

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The applicant, a Sri Lankan National, was charged at the magistrate court under s. 6(1)(c) Immigration Act 1959/63. The applicant pleaded guilty to the charge and after his plea in mitigation, the magistrate sentenced the applicant to four months imprisonment and one stroke of the rattan. On 12 December 2005, the Bar Council Legal Aid Centre of the Kedah/Perlis Bar Committee wrote to the High Court for revision under s. 323(1) of the Criminal Procedure Code on the grounds that the applicant

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- A was registered with the United Nations High Commissioner for refugees (UNCHR) as an asylum seeker under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and also under art. 22 of the Convention on the Rights of the Child and therefore shall
- B not be liable for any offence committed under the immigration laws. However, after hearing submissions and examining the record of proceedings by the magistrate, the court found that the magistrate had applied the correct principles of law to the facts of the case. The issue of the applicant being an asylum seeker
- C registered with the UNHCR was not raised at that stage and not considered. Thus, the court refused to exercise its power of revision under s. 323 CPC and dismissed the application. Dissatisfied, the applicant filed an originating motion pursuant to s. 50 of the Courts of Judicature Act 1964 for leave to appeal
- D against the decision of the High Court before the Court of Appeal. On 18 May 2006, the Court of Appeal granted leave to the applicant to appeal and to pose the following questions of law of public interest, namely: (1) whether the Immigration Act 1959/63 in general and in particular s. 6(1)(c) and s. 6(3) were applicable
- E to asylum seekers and refugees; (2) the implication and effect of the legal principles in *Mohamed Ezam v. Ketua Polis Negara* on the Convention on the Rights of the Child (CRC) which was ratified by the Malaysian Government and art. 22 required government to provide protection and assistance to asylum seekers and refugees;
- F (3) in consequence thereof, what was the implication of art. 22 on immigration cases involving asylum seekers and refugees such as the applicant at the magistrate's court.

Held (dismissing application for revision):

- G (1) The applicant was arrested for an offence under s. 6(1)(c) and punishable under s. 6(3) of the Immigration Act 1959/63 which was not the case envisaged by art. 31 of the Convention relating to the Status of Refugees 1951. The
- H applicant did not present himself without delay to the authorities and did not show good cause for his illegal entry. (para 20)

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- (2) This court was in agreement with the views expressed in the case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara* that the 1951 Convention and the 1967 Protocol and art. 22 Convention on the Rights of the Child were not legally binding on the Malaysian courts. This court was not obliged or compelled to adhere to the 1951 Convention and the 1967 Protocol. (paras 17 & 21) A B
- (3) Article 2 of the 1951 Convention under the heading 'General Obligations' states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order. The applicant herein must obey the laws and regulations passed by parliament failing which shall be liable to be prosecuted and punished like any other citizens of the country. (para 22 & 23) C D
- (4) The Immigration Act 1959/63 in general and in particular s. 6(1)(c) and s. 6(3) are applicable to the applicant as an asylum seeker and refugee. Article 22 of the Convention on the Rights of the Child was not relevant because the applicant did not come within the definition of child under Article I as it applied to every human being below the age of 18 years old. This was not a case in which this court ought to interfere with the decision of the Magistrate's Court. (para 24) E

Case(s) referred to:

Mohamad Ezam v. Ketua Polis Negara [2002] 4 CLJ 309 FC (*refd*) F

Legislation referred to:

Courts of Judicature Act 1964, s. 50

Criminal Procedure Code, ss. 323(1), 324, 325, Chap XXXI

Immigration Act 1959/63, ss. 4(4), 6(1)(c), (3) G

For the applicant - C Megalai; Bar Council Legal Aid Centre

For the respondent - Azhar Abd Hamid; DPP

Reported by Suhainah Wahiduddin H

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JUDGMENT**Mohd Sofian Abd Razak JC:**

[1] In this case, the applicant, Subramaniam Subakaran, a Sri Lankan national was charged on 27 October 2005 at the Magistrate Court at Kulim, Kedah Darul Aman as follows:

BAHAWA kamu, bukan seorang warganegara Malaysia, pada 17.10.2005 jam lebih kurang 4.35 petang, di RML Metal Enterprise, No. 10, Lot 626, Kg Paya Besar, Jalan Sg Seluang, Lunas, dalam Daerah Kulim, di dalam Negeri Kedah Darul Aman, didapati telah masuk dan berada di negara ini tanpa sebarang Pas atau Permit yang sah. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 6(1)(c) Akta Imigresen 1959/63 (Pindaan 2002) dan boleh dihukum di bawah Seksyen 6(3) Akta yang sama.

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[2] The applicant who was unrepresented pleaded guilty to the charge after the charge was read to him in Tamil by the court interpreter. After the applicant's plea in mitigation, the learned magistrate sentenced the applicant to four (4) months imprisonment and one (1) stroke of the rattan.

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[3] On 12 December 2005, the Bar Council Legal Aid Centre of the Kedah/Perlis Bar Committee wrote to the High Court for revision under s. 323(1) of the Criminal Procedure Code on the grounds that the applicant was registered with the United Nations High Commissioner for Refugees (UNHCR) as an asylum seeker under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and also Article 22 Convention on the Rights of the Child therefore shall not be liable for any offence committed under the immigration laws.

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[4] It is pertinent at this juncture to reproduce here the portions relevant to this judgment, of all five (5) sections of Chapter XXXI of the Criminal Procedure Code.

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S. 323 Power to call for records of inferior Courts

(1) A Judge may call for and examine the record of any proceeding before any Criminal Court of the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

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S. 324 Power to order further inquiry

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- (1) On examining any record under the last preceding section, or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section s. 135, or into the case of any accused person who has been discharged.

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S. 325 Powers of Judge on revision

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- (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by section s. 311, 315, 316 and 317 of this Code.

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- (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

- (3) Nothing in this section shall be deemed to authorize a Judge to convert a finding of acquittal into one of conviction.

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S. 326 Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection (2) of the last preceding section.

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S. 327 Orders on revision

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When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the find, sentence or order revised was recorded or passed stating, where such finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision do certified and, if necessary, the record shall be amended in accordance therewith.

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- A [5] Section 323 is the first of the sections in Ch XXXI of the CPC which, as has been seen, is entitled 'Of Revision'. Section 323 provides powers to the judge of the High Court, the exercise of which powers is the calling for an examining the records of inferior courts for the purposes set out in that section. Sections
- B 324 and 325 deal with the powers given to the judge to be exercised after he has exercised the powers given to him by s. 323. This is brought home in respect of s. 324 by the provision that the power to order further inquiry is to be exercised 'after examining any record ...' and by the heading to s. 325: 'Powers
- C of judge on revision.'
- [6] 'On revision', in the context, in my judgment, has reference to the exercise by the judge of the powers given to him by s. 323 and having done so, that is, having called in and examined the
- D record of proceedings of the inferior court, the directing of his mind as to whether he should or should not exercise the powers given to him by either s. 324 or s. 325.
- [7] On 15 January 2006, I called for the records of proceeding for the purpose of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the Magistrate's
- E Court.
- [8] Puan C. Megalai from the Bar Council Legal Aid Centre, Kedah/Perlis appeared on behalf of the applicant and En. Azhar bin Abd. Hamid, deputy public prosecutor appeared on behalf of Public Prosecutor for the respondent.
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- [9] Unfortunately, learned counsel for the applicant and the
- G learned deputy public prosecutor did not provide much assistance to the court. The learned counsel for the applicant in her submissions pointed out to the court that the applicant has been granted a status as an asylum seeker by the UNHCR with reference No: 04 MLS 09364 and therefore is exempted from
- H complying with the requirement of the Immigration Act 1959/63 (Amended 2002). She further submitted that as an asylum seeker the applicant shall not be liable for any offence committed under the immigration laws. Nevertheless no documentary proof indicating that the applicant was registered as an asylum seeker
- I was tendered to court. The learned deputy public prosecutor did not advance any substantive submission in rebuttal except to state that the learned magistrate had taken into account the facts and

circumstances of the case and the plea of mitigation by the applicant in considering the appropriate sentence to be imposed on the applicant. Thus after hearing the submissions by the learned counsel for the applicant and the learned deputy public prosecutor, and after examining the record of the proceeding by the learned magistrate and found that the learned magistrate had taken into account the facts and circumstances of the case and the plea of mitigation by the applicant. I find that learned magistrate had applied the correct principles of law to the facts of the case when sentencing the applicant to four months imprisonment and one (1) stroke of rattan. The issue of the applicant being an asylum seeker registered with the United Nations High Commissioner for Refugees (UNHCR) under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees and Article 22, Convention on the Rights of the Child was not raised at that stage and not considered by the court. The learned magistrate sentenced the applicant purely for an offence committed under s. 6(1)(c) of the Immigration Act 1959/63 (Amended 2002) and punishable under s. 6(3) of the Act. I therefore refused to exercise my power of revision under s. 323 of the Criminal Procedure Code and dismissed the application.

[10] The applicant who is dissatisfied with the decision of the court filed an originating motion pursuant to s. 50 of the Courts of Judicature Act 1964 for leave to appeal against the decision of the High Court before Court of Appeal on 26 January 2006 *inter alia* prayed for the following reliefs namely:

- (1) That the applicant be granted leave to file notice of appeal at the Court of Appeal against the decision of High Court on 15 January 2006 dismissing the applicant's application for Criminal Review No: 43-1-2006.
- (2) That, if leave is granted to file notice of appeal at the Court of Appeal against the decision of the High Court on 15 January 2006 the applicant be granted leave to file and serve the notice of appeal within 14 days from the date of the said order.
- (3) That, if necessary, the period fixed for service on the respondent before the hearing date of this motion be abridged.
- (4) Any other order or relief deemed fit by this Honourable Court.

A [11] On 18 May 2006, the Court of Appeal granted leave to the applicant to appeal and to pose the following questions of law of public interest, namely:

B (1) Whether the Immigration Act 1959/63 in general and in particular s. 6(1)(c) and s. 6(3) are applicable to asylum seeker and refugee.

C (2) (a) The implication and effect of the legal principles in *Mohamad Ezam v. Ketua Polis Negara* [2002] 4 CLJ 309 on the Convention on the Rights of the Child (CRC) which was ratified by the Malaysian Government and Article 22 requires Government to provide protection and assistance to asylum seeker and refugee.

D (b) In consequence thereof, what is the implication of Article 22 on immigration cases involving asylum seeker and refugee such as the applicant at the Magistrate's Court.

E (3) Whether the sentence of whipping as stipulated in s. 6(3) of the Immigration Act 1959/63 is mandatory or otherwise (ie, discretionary).

F [12] I looked to the Convention relating to the Status of Refugees, 1951 which came into force on 22 April 1954. (hereinafter called the 1951 Convention). The relevant paragraphs in the preamble which is worth noting are as follows:

G Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

H Expressing the wish that all states, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between states.

I Noting that the United Nations High Commissioner for Refugees (UNHCR) is charged with the task of supervising international conventions providing for the protection of refugees and recognizing that the effective coordination of measures taken to deal with this problem will depend upon the co-operation of states with the High Commissioner.

[13] Under the heading General Provisions contained the definition of the term 'refugee' in Article I. **A**

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

- (2) As a result of events occurring before 1st January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, in unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as of such events, is unable or, owing to such fear, is unwilling to return to it. **B**
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Article 2 – General Obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order. **D**

It is to be noted that the Convention relating to the Status of Refugees 1951 covers only those persons who have become refugees as a result of events occurring before 1st January 1951. Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention and the desirability that equal status should be enjoyed by all refugees covered by the definition in the Convention Prospective of the dateline 1st January 1951, that the Protocol Relating to the Status of Refugees, 1967 was passed and came into force on the 4th October 1967 (hereinafter called the 1967 Protocol). **E**

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[14] Article I(1) of the Protocol states that 'The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined. **G**

[15] In other words, the Protocol applies to articles 2 to 34 inclusive of the Convention to refugees such as the applicant. The question to be asked is whether Malaysia, a signatory to the above Convention and Protocol, is obligated to honour its commitment as Contracting States? **H**

[16] The Human Rights Commission of Malaysia Act 1999 was enacted for the protection and promotion of human rights in Malaysia. **I**

- A [17] In the case of *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara* [2002] 4 CLJ 309, the Federal Court had to consider the implication of s. 4(4) of the Act in the context of the Universal Declaration of Human Rights 1948 ('the 1948 Declaration'). Siti Norma Yaakob FCJ (as she then was) opined that "the 1948
- B Declaration and several other United Nations documents on the right of access cannot be accepted as such documents were not legally binding on the Malaysian courts. The use of the words 'regard shall be had' in s. 4(4) of the Human Rights Commission of Malaysia Act can only mean an invitation to look at the 1948
- C Declaration if one was disposed to do and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration. This was further emphasized by the qualifying provision of s. 4(4) of the Act, which provided that regard to the
- D 1948 Declaration was subject to the extent that it was not inconsistent with the Constitution."

- [18] In the context of the 1951 Convention, the relevant article which I had to consider is article 31 – on refugees unlawfully in the country of refugee which states as follows:
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1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugee who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
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- [19] It is implicit from the above article that Contracting States shall not impose penalties on account of their illegal entry or presence on refugee provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
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- [20] The facts of the case before the court indicated that the applicant was arrested for an offence under s. 6(1)(c) and punishable under s. 6(3) of the Act which is not the case as envisaged by article 31 of the Convention relating to the Status of Refugees 1951. The applicant did not present himself without delay to the authorities and show good cause for his illegal entry.
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[21] In any event, I am in agreement with the views expressed by Siti Norma Yaakob FCJ (as she then was) in the case of *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara (supra)* that the 1951 Convention and the 1967 Protocol and Article 22 Convention on the Rights of the Child are not legally binding on the Malaysian courts. I am of the view that the court is not obliged or compelled to adhere to the 1951 Convention and the 1967 Protocol.

[22] To fortify my reasoning, reference is made to Article 2 of the 1951 Convention under the heading 'General obligations' which states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

[23] It follows that the applicant herein must obey the laws and regulations passed by Parliament failing which shall be liable to be prosecuted and punished like any other citizens of the country.

[24] The upshot of which, I find that the Immigration Act 1959/63 in general and in particular s. 6(1)(c) and s. 6(3) are applicable to the applicant as an asylum seeker and refugee; and that the 1951 Convention and the 1967 Protocol are not legally binding on Malaysian courts. Article 22 of the Convention on the Rights of the Child is not relevant because the applicant does not come within the definition of child under Article I as it applies to every human being below the age of 18 years old. The applicant herein was at the date of offence 27 years old. In the circumstances, in my view this is not a case in which I ought to interfere with the decision on the Magistrate's Court and accordingly dismissed the application for revision.

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